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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO/OAKLAND
DIVISION

JANE ROE, an individual; MARY ROE,
an individual; SUSAN ROE, an
individual; JOHN ROE, an individual;
BARBARA ROE, an individual;
PHOENIX HOTEL SF, LLC, a
California limited liability company;
FUNKY FUN, LLC, a California limited
liability company; and 2930 EL
CAMINO, LLC, a California limited
liability company,

Plaintiffs,

v.

CITY AND COUNTY OF SAN
FRANCISCO, a California public entity,

Defendants.

Case No. 4:24-cv-01562-JST

**PLAINTIFFS' OPPOSITION TO
DEFENDANT'S MOTION TO
DISMISS THE FIRST AMENDED
COMPLAINT**

**ASSIGNED FOR ALL PURPOSES
TO THE HONORABLE DISTRICT
JUDGE JON S. TIGAR,
COURTROOM 6**

Hearing Date: 10/10/2024
Time: 2:00 PM
Place: Courtroom 6, 2nd Floor

Action Filed: 03/14/2024
Trial Date: Unassigned

TABLE OF CONTENTS**Page**

I.	INTRODUCTION	1
II.	STANDARDS.....	1
A.	Applicable Rule 12(b)(6) Principles.....	1
B.	Article III Standing Requirement	2
III.	RELEVANT PROCEDURAL HISTORY	3
A.	The Initial Complaint	3
B.	The Ruling on the Motion to Dismiss the Initial Complaint	3
C.	The First Amended Complaint.....	4
IV.	DISCUSSION	6
A.	Plaintiffs Mary and Susan Roe have adequately alleged a claim under the California Disabled Persons Act.	6
B.	Plaintiffs have alleged affirmative conduct by the City that was a cause of the nuisance.....	7
C.	Nuisance actions against public entities founded on Civil Code § 3479 are not barred by Government Code § 815	11
D.	Plaintiffs allege affirmative conduct by the City that has placed them in danger.....	12
E.	Plaintiffs seek injunctive relief that does not necessarily create financial burdens or implicate prosecutorial decisions.....	14
F.	Whether the City's conduct falls under the Emergency Services Act or Proclamations is an issue of disputed fact.....	15
V.	CONCLUSION	16

TABLE OF AUTHORITIES

Page

CASES

<i>Allen v. Wright</i> , 468 U.S. 737, 752 (1984)	2
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662, 678 (2009)	2
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544, 555 (2007)	2
<i>Birke v. Oakwood Worldwide</i> , 169 Cal. App. 4th 1540, 1551 (2009)	11
<i>City & Cnty. of San Francisco v. Purdue Pharma L.P.</i> , 491 F. Supp. 3d 610, 674 (N.D. Cal. 2020)	8, 10
<i>City of Los Angeles v. Superior Ct.</i> , 62 Cal. App. 5th 129, 138, 276 Cal. Rptr. 3d 332, 338 (2021)	12
<i>Clapper v. Amnesty Int’l USA</i> , 568 U.S. 398, 408 (2013)	2
<i>DeShaney v. Winnebago County Dep’t of Soc. Serv.</i> , 489 U.S. 189, 195 (1989)	12, 13
<i>Giannuzzi v. State of California</i> , 17 Cal. App. 4th 462, 467 (1993)	12
<i>Hernandez v. City of San Jose</i> , 897 F.3d 1125, 1133 (9th Cir. 2018)	13
<i>Hood v. City of Sacramento</i> , no. 223CV00232KJMCKD, 2023 WL 6541870, at *4 (E.D. Cal. Oct. 6, 2023)	15
<i>Ileto v. Glock Inc.</i> , 349 F.3d 1191, 1212 (9th Cir. 2003)	10
<i>In re Gilead Scis. Sec. Litig.</i> , 536 F.3d 1049, 1055 (9th Cir. 2008)	2
<i>Kempton v. City of Los Angeles</i> , 165 Cal. App. 4th 1344, 1349 (2008)	10
<i>Kennedy v. City of Ridgefield</i> , 439 F.3d 1055, 1063 (9th Cir. 2006)	13
<i>Keyes v. Santa Clara Valley Water Dist.</i> , 128 Cal. App. 3d 882, 885-886 (1982)	12
<i>Khoja v. Orexigen Therapeutics, Inc.</i> , 899 F.3d 988, 1000 (9th Cir. 2018)	15
<i>Knieval v. ESPN</i> , 393 F.3d 1068, 1072 (9th Cir. 2005)	2
<i>Koll-Irvine Center Property Owners Assn. v. County of Orange</i> (1994) 24 Cal.App.4th 1036	7
<i>Lew v. Superior Court of Alameda County</i> , 20 Cal.App.4th 866 (1993)	8, 9
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555, 560–61 (1992)	2
<i>Mangini v. Aerojet–General Corp.</i> , 230 Cal.App.3d 1125, 1134 (9th Cir. 1991)	10

1	<i>Martinez v. City of Clovis</i> , 943 F.3d 1260, 1271 (9th Cir. 2019).....	13
2	<i>Mendiondo v. Centinela Hosp. Med. Ctr.</i> , 521 F.3d 1097, 1104 (9th Cir. 2008)	1
3	<i>Nealy v. County of Orange</i> , 54 Cal. App. 5th 594, 602 (2020)	12
4	<i>Patel v. Kent Sch. Dist.</i> , 648 F.3d 965, 971–72 (9th Cir. 2011)	13
5	<i>Schooler v. State of California</i> , 85 Cal. App. 4th 1004 (2000)	1, 4, 6, 14
6	<i>Steinle v. City & Cnty. of San Francisco</i> , 230 F. Supp. 3d 994, 1024 (N.D. Cal. 2017).....	14
7	<i>United States v. Texas</i> , 599 U.S. 670, 675 (2023).....	2, 3
8	<i>Vedder v. Cnty. of Imperial</i> , 36 Cal. App. 3d 654, 661 (1974)	7

9

10 **STATUTES**

11

12	Civil Code § 3480.....	7
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13

14	Civil Code § 3481.....	7
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16	Fed. R. Civ. P. 8(a)(2)	1
----	-------------------------------	---

17

18	Government Code § 814.....	4
----	----------------------------	---

19

20	Government Code § 815.....	4, 11
----	----------------------------	-------

21

22	Government Code § 818.2	4
----	-------------------------------	---

23

24	Health & Safety Code §11570.....	9
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I. INTRODUCTION

Plaintiffs oppose defendant City and County of San Francisco's motion to dismiss four of the six causes of action contained in their First Amended Complaint (FAC). The motion should be denied because plaintiffs have added plausible allegations about affirmative conduct by the City that has drawn narcotics activity to the Tenderloin and that encourages drug addicts who refuse offers of shelter to live in encampments on that neighborhood's sidewalks. Each plaintiff has made specific allegations showing how the foreseeable consequences of the City's affirmative acts has injured and endangered them.

The City's state law immunity argument fails. Should plaintiffs prove their state claims, then this Court can consider appropriate injunctive relief. For example, should plaintiffs prove that the City has created nuisances that harms and endangers them, then this Court could prohibit the City from engaging in specific conduct that is causing the nuisances, such as ordering the City to stop distributing drug paraphernalia to addicts living in sidewalk encampments next to plaintiffs' homes and businesses. That type of relief would have no fiscal impact on the City and would not impinge upon prosecutorial functions. The principles behind the decision in *Schooler v. State of California*, 85 Cal. App. 4th 1004 (2000) may constrain the remedies available in this case, but they do not vitiate plaintiffs' claims.

II. STANDARDS

A. Applicable Rule 12(b)(6) Principles

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). A complaint need not contain detailed factual allegations, but facts pleaded by a plaintiff "must be enough to raise a right to

relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citation omitted). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* The Court must “accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party.” *Kniesel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). However, the Court is not “required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (internal quotation marks and citation omitted).

B. Article III Standing Requirement

To invoke the jurisdiction of a federal court, plaintiffs must demonstrate standing, which consists of the “irreducible constitutional minimum” of (1) an injury in fact; (2) caused by the defendant; that is (3) redressable by a court order. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). “The principle of Article III standing is ‘built on a single basic idea—the idea of separation of powers.’” *United States v. Texas*, 599 U.S. 670, 675 (2023) (quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984)). “By ensuring that a plaintiff has standing to sue, federal courts ‘prevent the judicial process from being used to usurp the powers of the political branches.’” *Id.* at 676 (quoting *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408 (2013)). The Supreme Court has “stressed that the alleged injury must be legally and judicially cognizable” which “requires, among other things, that the dispute is traditionally thought to be capable of resolution through the judicial process—in other words, that the asserted injury is traditionally redressable in federal court.” *Id.* at 676 (internal quotation marks and citations omitted).

III. RELEVANT PROCEDURAL HISTORY

A. The Initial Complaint

Plaintiffs' initial complaint alleged ten causes of action: (1) violations of the ADA; (2) violations of Section 504; (3) violations of the California Disabled Persons Act; (4) public nuisance; (5) private nuisance; (6) violations of Due Process; (7) violation of Equal Protection; (8) violation of Due Process, State-Created Danger Doctrine; (9) Negligence; and (10) deprivation of the Guarantee of Safety and the Pursuit of Happiness, California Constitution, Article I, § 1. (ECF no. 1.) The disability claims, causes of action (1) through (3), were brought by plaintiffs Susan and Mary Roe only. All plaintiffs brought the remaining claims. Plaintiffs sought equitable/injunctive relief, fees and costs but did not pray for monetary damages. (*Id.*)

B. The Ruling on the Motion to Dismiss the Initial Complaint

The City moved to dismiss the entire complaint. (ECF no. 35.) The Court denied the City's motion as to the federal disability claims, causes of action (1) and (2), but granted the City's motion to dismiss the remaining causes of action, (3) through (10), with leave to amend. (ECF no. 46 at 12.)

Specifically, the Court granted the City's motion to dismiss the three constitutional claims, counts (6), (7) and (8), because the complaint contained scant allegations of affirmative conduct by the City, and "a review of the complaint reveals [plaintiffs] claims are premised on the City's 'de facto' policy of non-enforcement in the Tenderloin and the affirmative acts of non-parties." (ECF no. 46 at 4.) The Court explained that plaintiffs lacked standing to assert the claims as alleged, citing authority for the proposition that citizens lack standing to challenge prosecutorial decisions when they are not themselves being prosecuted or threatened with prosecution. (*Id.* at 5-7, citing *United States v. Texas*, 599 U.S. 670 (2023) and other authorities.)

The Court ruled that plaintiffs Susan and Mary Roe had adequately alleged

1 their federal disability claims and denied the City's motion to dismiss the ADA and
2 Section 504 claims. (ECF no. 46 at 7-9.)

3 The Court granted the motion to dismiss the tenth cause of action, the
4 California Constitution claim, because that provision does not impose a mandatory
5 duty on public entities to protect a citizens' rights. (ECF no. 46 at 10.)

6 Finally, the Court addressed the City's argument that it was immune from
7 liability for plaintiffs' remaining state law claims "because they are premised on the
8 City's failure to enforce laws." (*Id.* at 10 citing Government Code §§ 815 and 818.2.)
9 The Court acknowledged that plaintiffs, citing Government Code § 814, argued that
10 because they only seek equitable relief the immunity provisions cited by the City are
11 inapplicable. The Court, however, noted that *Schooler v. State of California*, 85 Cal.
12 App. 4th 1004 (2000) held that a public entity is immune from injunctive or equitable
13 relief that imposes significant financial burdens. The Court held that "the injunctive
14 relief Plaintiffs seek would require the City to enforce its drug and anti-encampment
15 laws to a greater extent than it now does. As in *Schooler*, this would create legal and
16 financial burdens on the City that the Tort Claims Act guards against." The Court
17 thus dismissed the remaining state law claims with leave to amend. (ECF no. 46 at
18 10-12.)

19 **C. The First Amended Complaint**

20 Plaintiffs thereafter filed the FAC. (ECF no. 50.) The FAC includes six causes
21 of action, compared to the 10 counts in the original complaint. Plaintiffs did not
22 renew two federal constitutional claims. They also dropped their claim under the
23 California Constitution and their state law claim for negligence.

24 The first two counts of the FAC are the ADA and Section 504 causes of action,
25 which the City does not challenge in the instant motion.

26 The FAC's third cause of action alleges violations of the California Disabled
27 Persons Act. Count four alleges public nuisance. Count five alleges private nuisance.
28 The sixth and final cause of action alleges violations of the Due Process Clause,

1 State-Created Danger Doctrine. The City moves to dismiss all four of those claims.

2 Plaintiffs added to the FAC allegations of affirmative conduct by the City that:
3 (1) has drawn illegal narcotics activity to the Tenderloin; and (2) encourages addicts
4 who refuse offers of shelter to camp out and use drugs on that neighborhood's
5 sidewalks. Plaintiffs allege:

- 6 • The City directly and indirectly distributes drug paraphernalia to
7 addicts who live in sidewalk encampments in the Tenderloin. City
8 departments and agencies distribute and/or facilitate the distribution of
9 fentanyl smoking kits "to addicts who opt to live on the Tenderloin's
10 sidewalks, often using euphemisms like 'harm reduction' or 'personal
11 autonomy' in documents and public statements to conceal the true
12 nature of such activities." (ECF no. 50 at ¶¶ 13, 14.)¹
- 13 • The City pays millions to organizations that the City knows to
14 distribute drug paraphernalia to addicts who camp out on the
15 Tenderloin's sidewalks. (*Id.* at ¶ 15.)
- 16 • The City's operates at least four separate programs that provide
17 services, supplies and support to addicts who reject offers of shelter and
18 instead live in tents on the Tenderloin's sidewalks. (*Id.* at ¶¶ 17-20.)
- 19 • The City opened the "Tenderloin Center" in January 2022. In knowing
20 violation of state and federal criminal statutes, the City encouraged addicts
21 to go there to consume fentanyl and other narcotics. The City instructed
22 members of the SFPD to drop off addicts at the center. By doing this, "the
23 City sent the clear and unmistakable message" to addicts and dealers that
24 they should come to the Tenderloin to sell, buy and use drugs, which they
25 foreseeably did. The City closed the Tenderloin Center in December 2022,
26 "but the harmful aftereffects of its operations continue to this day because
27 many of the addicts and dealers who were drawn to the Tenderloin by the
28 City's operation of the Tenderloin Center remain in the neighborhood." (*Id.*
at ¶¶ 22, 24-28.)

1 These allegations should be accepted as true at the Rule 12(b)(6) stage. The City
nevertheless seeks to inject extrinsic evidence to cast doubt about these and other
allegations. For example, the City cites to a claim made in a news article to the effect
that the does not distribute fentanyl smoking kits or "explicitly" fund such
expenditures. (ECF no. 51 at 4.) Should there be doubts about the plausibility of
plaintiffs' allegations, here is a link to a video recently posted on social media; it
shows what appears to be an employee of the SF DPH handing out narcotic pipes to
addicts who are sprawled out on a public sidewalk and blocking passage.
<https://twitter.com/i/status/1828874366396051699>

- City officials recently supported the “activists” who set up tents on a Tenderloin street and invited addicts to come there to collect drug paraphernalia and ingest fentanyl. (*Id.* at ¶ 32.)
- Starting in 2020, the City took over the COVA Hotel on Ellis Street, steps away from plaintiff Jane Roe’s apartment. Before the City takeover, the COVA had been a tourist hotel that brought vibrancy and commerce to the Tenderloin. The City now runs the COVA as a “non-congregate shelter.” The City follows a “housing first” approach at the COVA, and allows occupants to live there even if they use and sell drugs or engage in harmful behavior inside and around the property. Illegal narcotics usage became rampant inside and around the COVA after the City took over operations. The COVA is now a magnet for illegal and dangerous narcotics activities in the surrounding neighborhood, including directly in front of Jane Roe’s apartment building. The City’s operations at the COVA expose Jane Roe to unreasonable dangers and harms. When she enters or leaves her apartment, she encounters drug dealers and addicts who openly inject and smoke fentanyl and block the building’s entrance. She once cleared garbage from her steps and got stuck by a used syringe. People gathered in front of her building regularly threaten her and light bonfires. Encampments, bulky items and displays of stolen goods block passage of the sidewalks near her home. Trash, used syringes and human waste befoul the area. She and her family must walk in the busy street to get around these hazards and dangers. The City recently extended its operations at the COVA for another seven months. (*Id.* at ¶¶ 45-55.)

IV. DISCUSSION

A. Plaintiffs Mary and Susan Roe have adequately alleged a claim under the California Disabled Persons Act.

The FAC alleges that the City’s affirmative conduct encourages addicts to camp out and block the sidewalks and public spaces around Mary and Susan Roe’s residences. If proved, relief from the City’s conduct would be warranted. The claim has been adequately pled. Unlike *Schooler v. State of California*, *supra*, 85 Cal. App. 4th 1004, where the remedy would have been extremely costly to implement, the relief needed to address the harm to Mary and Susan Roe need not necessarily impose any fiscal burden on the City. Instead, it may only require that the City stop engaging in certain activities. Thus, the City is not immune as a matter of law from this claim.

B. Plaintiffs have alleged affirmative conduct by the City that was a cause of the nuisance.

All plaintiffs bring the fourth and fifth causes of action, which allege public and private nuisance. These claims are adequately pled.

Nuisance actions can be brought against public entities “to the extent that such actions are founded on Civil Code sections 3479, 3480 and 3481, which define public and private nuisances.” *Vedder v. Cnty. of Imperial*, 36 Cal. App. 3d 654, 661 (1974).

Plaintiffs’ allegations about how they are affected and harmed by conditions adjacent to their homes and businesses, are all recognized by Civil Code § 3479, which provides the general definition of what is a nuisance. That statute says:

Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of ... any public park, square, street, or highway, is a nuisance.

Civil Code § 3480 defines which nuisances are a “public nuisance” and comports with plaintiffs’ allegations about how the City’s conduct affects their entire neighborhood. It says, “[a] public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.” While Civil Code § 3481 defines a private nuisance as being every type of a nuisance that is not a public nuisance.

“‘A nuisance may be both public and private, but to proceed on a private nuisance theory the plaintiff must prove an injury specifically referable to the use and enjoyment of his or her land. The injury, however, need not be different in kind from that suffered by the general public.’” *People v. ConAgra Grocery Prod. Co.*, 17 Cal. App. 5th 51, 122 (2017) quoting *Koll-Irvine Center Property Owners Assn. v. County of Orange* (1994) 24 Cal.App.4th 1036, 1041.

1 A public nuisance cause of action is premised on affirmative conduct that
 2 assisted in the creation of a hazardous condition. Affirmative conduct encompasses
 3 any action that assists in creating a system that causes hazardous conditions. *City &*
 4 *Cnty. of San Francisco v. Purdue Pharma L.P.*, 491 F. Supp. 3d 610, 674 (N.D. Cal.
 5 2020) (the City sufficiently pleaded that pharmaceutical companies and drug-store
 6 chains engaged in affirmative conduct that enabled the opioid epidemic in the City,
 7 as was relevant to determining if the City had stated a public-nuisance claim).

8 Here, plaintiffs allege that the City's affirmative conduct has caused nuisances
 9 around their premises. For example, since 2020 the City has operated a congregate
 10 shelter at the COVA and follows a "housing first" approach to running it. The City
 11 takes no action against the COVA occupants that the City knows to sell and use
 12 narcotics, or who engage in other injurious conduct in and around the property,
 13 which is steps from plaintiff Jane Roe's apartment. The City's operation of the COVA
 14 endangers Jane Roe and her family. (ECF no. 50 ¶¶ 45-49.) Similarly, the City
 15 opened and operated a narcotics consumption site in the Tenderloin, in violation of
 16 federal and state criminal statutes. (*Id.* at ¶¶ 22, 24.) The City instructed members of
 17 the SFPD to drop off addicts at the center. (*Id.* at ¶ 25.) This affirmative conduct
 18 actively placed, drew and encouraged addicts and dealers to come to the Tenderloin.
 19 (*Id.* at ¶ 22-32.) The City also distributes, funds and facilitates the distribution of
 20 drug paraphernalia to addicts who refuse offers of shelter and instead live in tents on
 21 the Tenderloin's sidewalks. (*Id.* at ¶¶ 13-16.) The City also provides "street based"
 22 support and encourage persons who reject shelter and instead live in sidewalk
 23 encampments in front of plaintiffs' homes and businesses. (*Id.* at ¶¶ 17-20.)

24 *Lew v. Superior Court of Alameda County*, 20 Cal.App.4th 866 (1993) is both
 25 analogous and instructive. There, plaintiffs lived near a multi-unit HUD insured
 26 apartment complex owned by defendants. Plaintiffs alleged defendants allowed
 27 illegal drug activity to occur at the complex. The allegations resembled those made in
 28 this case. For example, "[n]umerous times I have been confronted by dealers or

1 buyers and I am now afraid to walk near this property and down my street.” *Id.* at
 2 869. The trial court found that the complex was being used as a center for sale and
 3 distribution of drugs and awarded the plaintiffs damages. *Id.* at 870. Defendant
 4 brought a writ seeking to set aside the judgment, arguing that they could not be held
 5 liable for the criminal acts of third parties. The court of appeals denied the petition,
 6 holding:

7 The Legislature has resolved any doubt as to the question
 8 of whether a so-called “drug house” is a nuisance through
 9 the enactment of section 11570 of the Health and Safety
 10 Code. That section, enacted in 1972, provides as follows:
 11 “Every building or place used for the purpose of unlawfully
 12 selling, serving, storing, keeping, manufacturing, or giving
 13 away any controlled substance, precursor, or analog
 14 specified in this division, and every building or place
 15 wherein or upon which those acts take place, is a nuisance
 16 which shall be enjoined, abated, and prevented, and for
 17 which damages may be recovered, whether it is a public or
 18 private nuisance.”

19 The fact that the immediate and specific injury
 20 plaintiffs suffered from this nuisance was due to the acts of
 21 third parties, rather than, for example, being due to
 22 noxious gases, is not relevant to the issue of whether the
 23 property qualifies as a nuisance under section 11570. That
 24 section does not require that the unlawful activity which
 25 makes the building a nuisance be conducted by the owner
 26 of the building, a tenant of the building, or a person
 27 entering with permission.

28 *Id.* at 871 (footnote omitted).

 The City’s operation of the COVA, as alleged, constitutes a public and private
 nuisance under Health & Safety Code §11570.

 Even where section 11570 does not apply, the City’s affirmative acts in
 operating the COVA and the Tenderloin Center, its distribution of drug
 paraphernalia, and its “street based” programs that support addicts who opt to live in
 sidewalk encampments, plausibly results in a nuisance due to the foreseeable
 conduct of addicts and dealers who, as a result, congregate around plaintiffs’ homes
 and businesses. An adequate claim has been pled. *See City & Cnty. of San Francisco*
v. Purdue Pharma L.P., 491 F. Supp. 3d at 634 (San Francisco sufficiently alleged

1 distributors' dispensing of opioids, despite specific warnings of a threat to public
 2 health, enabled the foreseeable intervening acts of third parties resulting in
 3 "increased rates of addiction and overdoses.").

4 At the pleading stage, plaintiffs need only show that the trier of fact could
 5 reasonably conclude: (1) the City's mismanagement of Tenderloin Center and the
 6 COVA, its distribution of drug paraphernalia, and its provision of services to addicts
 7 living in sidewalk encampments, substantially increases the amount of drug activity,
 8 congregation and offensive smells around plaintiffs' homes and businesses; (2) these
 9 increases are not so remote as to be the legal cause of plaintiffs' harm; and (3) the
 10 City's conduct was a substantial factor in producing the harm, even where another
 11 "person, condition or event was also a substantial factor." CACI 431; *see also City &*
 12 *Cnty. of San Francisco v. Purdue Pharma L.P.*, 491 F. Supp. 3d at 677.

13 The resulting crowding, offensive smells, and fear of physical harm that
 14 interferes with plaintiffs' use, enjoyment and egress from their property are
 15 cognizable nuisances. *See Kempton v. City of Los Angeles*, 165 Cal. App. 4th 1344,
 16 1349 (2008) (impairment of access to and from a home to abutting public streets
 17 through physical barriers and the fear of physical harm stemming from navigating
 18 the obstructions constitute both private and public nuisance). Moreover, California
 19 law does not require that a nuisance originate from neighboring property. *See*
 20 *Mangini v. Aerojet-General Corp.*, 230 Cal.App.3d 1125, 1134 (9th Cir. 1991)
 21 (military laundry operations contaminated plaintiff's water well, 2000 feet away from
 22 laundry); *see also Ileto v. Glock Inc.*, 349 F.3d 1191, 1212 (9th Cir. 2003) (California
 23 law on proximate or legal cause does not require the defendant control the
 24 instrument that caused the nuisance, so long as the conduct was a substantial
 25 factor).

26 California recognizes that the aftereffects of prior conduct, such as the City's
 27 operation of illegal narcotics consumption site at the Tenderloin Center, can continue
 28 to assist in the creation of the public nuisance. *People v. ConAgra Grocery Prod. Co.*,

17 Cal. App. 5th 51, 97 (2017) (lead paint manufacturer’s advertising in the 1930-40’s was evidence of assisting in creating the public nuisance of lead paint in residential homes built after 1950 even if it stopped producing lead paint in 1948).

The City’s argument that plaintiffs fail to allege an injury that is “different in kind” from the general public lacks merit. There is no requirement that plaintiffs suffer damage different in kind when the nuisance is both private and public. *Birke v. Oakwood Worldwide*, 169 Cal. App. 4th 1540, 1551 (2009). Moreover, each plaintiff satisfies the special injury requirement if needed. Allegations of injury to “private property or to the health and comfort of an individual” are peculiar to the individual and satisfies as a special injury. *Id.* at 1550 (plaintiff sufficiently alleged discomfort and annoyance and the interference with the right to enjoy the rented premises from adjourning second hand smoke in common areas).

Each plaintiff makes specific allegations about how the harms that the City affirmatively fostered in the Tenderloin affects them and their property. (ECF no. 50 ¶¶ 34-37, 43-55, 57-58, 61, 62-64, 66, 67-68, 72-75, 77, 85-86, 89-92.)

In sum, the City’s motion to dismiss should be denied as to the fourth and fifth causes of action.

C. Nuisance actions against public entities founded on Civil Code § 3479 are not barred by Government Code § 815

The Legislative Committee made clear in its comments that Civil Code § 3479 provides the statutory basis for nuisance actions against public entities: “Under this statute, the right to recover damages for nuisance will have to be established under the provisions relating to dangerous conditions of public property *or under some other statute* that may be applicable to the situation. However, *the right to specific or preventive relief in nuisance cases is not affected.*” Cal. Gov. Code § 815, Legislative Committee Comments (emphasis supplied). The California Supreme Court confirmed the intent of the Legislature in *Nestle v. City of Santa Monica*, 6 Cal. 3d 920, 933 (1972), in which they concluded:

1 In view of the pervasive influence the commission has
 2 enjoyed in the field of governmental immunity, practically
 3 authoring both the 1963 act and the 1970 amendments, we
 4 must conclude that the Legislature, with due deliberation,
 5 decided to reject the commission's proposal to bar suits
 6 against public entities for nuisance. Consequently it is
 7 manifest that the Legislature intended to allow such
 8 causes of action if they could be tailored to meet the
 9 specifications of statutory provisions, such as section 3479
 10 of the Civil Code.

11 *Id.* at 937 (footnotes omitted).

12 The City cites to several cases for the proposition that public entity liability for
 13 nuisance must flow through the Tort Claims Act's requirement for particularity.
 14 None of the cases it cites, however, relate to nuisance claims relying upon Civil Code
 15 § 3479. *Keyes v. Santa Clara Valley Water Dist.*, 128 Cal. App. 3d 882, 885-886 (1982)
 16 (negligence); *see also City of Los Angeles v. Superior Ct.*, 62 Cal. App. 5th 129, 138
 17 (2021) (negligence); *Giannuzzi v. State of California*, 17 Cal. App. 4th 462, 467 (1993)
 18 (dangerous condition of public property); *Nealy v. County of Orange*, 54 Cal. App. 5th
 19 594, 602 (2020) (same). As detailed above, plaintiffs allegations adhere to the
 20 requirements set forth in Civil Code § 3479.

21 **D. Plaintiffs allege affirmative conduct by the City that has placed them**
 22 **in danger.**

23 In *DeShaney v. Winnebago County Dep't of Soc. Serv.*, 489 U.S. 189, 195 (1989)
 24 the Supreme Court held that a government is not obligated under the due process
 25 clause to "protect the life, liberty, and property of its citizens against invasion by
 26 private actors." An exception to the rule exists, however, where the state actor
 27 affirmatively places the plaintiff in a dangerous situation. "It is ... well established
 28 that, although the state's failure to protect an individual against private violence
 does not generally violate the guarantee of due process, it can where the state action
 'affirmatively place[s] the plaintiff in a position of danger,' that is, where state action
 creates or exposes an individual to a danger which he or she would not have
 otherwise faced." *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1063 (9th Cir. 2006),

1 quoting *DeShaney*, 489 U.S. at 197. The affirmative act must create an actual,
 2 particularized danger, and the ultimate injury to the plaintiffs must be foreseeable.
 3 *Hernandez v. City of San Jose*, 897 F.3d 1125, 1133 (9th Cir. 2018) (attendees of
 4 political rally alleged police officers violated their due process rights under state-
 5 created danger theory by shepherding them into a crowd of violent protesters).

6 The Ninth Circuit has held that a local government may violate substantive
 7 due process if it “ ‘affirmatively places [a plaintiff] ... in danger by acting with
 8 ‘deliberate indifference’ to a ‘known or obvious danger.’ ” *Martinez v. City of Clovis*,
 9 943 F.3d 1260, 1271 (9th Cir. 2019), quoting *Patel v. Kent Sch. Dist.*, 648 F.3d 965,
 10 971–72 (9th Cir. 2011)). To prevail on state-created danger doctrine, a plaintiff must
 11 show that (1) “the officers’ affirmative actions created or exposed her to an actual,
 12 particularized danger that she would not otherwise have faced,” (2) “the injury ...
 13 suffered was foreseeable,” and (3) “the officers were deliberately indifferent to the
 14 known danger.” *Id.*

15 Here, plaintiffs’ allegations satisfy each of these three prongs.

16 First, they allege that the City opened and operated an illegal drug
 17 consumption site in their neighborhood, and thereby encouraged addicts and dealers
 18 to come there. Many addicts and dealers so drawn to the Tenderloin remain there to
 19 this day. Further, the City directly and indirectly distributes drug paraphernalia to
 20 addicts who refuse offers of shelter and instead camp on the Tenderloin’s sidewalks.
 21 At least four City agencies provide support, kits and services to addicts living on the
 22 Tenderloin’s sidewalks. These affirmative acts foreseeably created “actual,
 23 particularized dangers,” *e.g.*, they encouraged gang members dealing drugs and
 24 unstable fentanyl addicts to habituate the sidewalks of the Tenderloin. Plaintiff Jane
 25 Roe, in particular, alleges a straight line between the City’s operation of the COVA
 26 near her apartment and the creation of “actual particularized dangers” that she
 27 would not have otherwise faced.

28 Second, as discussed above, it was highly foreseeable that the City’s

1 affirmative acts would cause plaintiffs to suffer injury.

2 Finally, the allegations could support the trier of fact to conclude City officials
3 have shown deliberate indifference to these dangers.

4 What plaintiffs allege differs from what happened in *Steinle v. City & Cnty. of*
5 *San Francisco*, 230 F. Supp. 3d 994, 1024 (N.D. Cal. 2017), *aff'd*, 919 F.3d 1154 (9th
6 Cir. 2019) (*Steinle II*), where the danger-creation claim failed because the City's
7 release of a felon equally endangered *everyone* in the city. Here, by contrast, the
8 City's operation at the COVA foreseeably endangers those who live nearby. Likewise,
9 the City's distribution of drug paraphernalia and provision of services to addicts
10 living in tents illegally pitched on public sidewalks endangers those who live or run a
11 business next to the encampments.

12 The City's argument that plaintiffs have not plausibly alleged causation belies
13 common sense. It is highly plausible to conclude that handing out drug
14 paraphernalia and providing support to addicts who refuse offers of shelter and
15 instead opt to camp out on a Tenderloin sidewalk will cause harm to those who live
16 next to the encampment.

17 **E. Plaintiffs seek injunctive relief that does not necessarily create**
18 **financial burdens or implicate prosecutorial decisions.**

19 The City's reliance on *Schooler* is misplaced. The City contorts the holding in
20 *Schooler* to apply broadly to any claim seeking injunctive relief. In *Schooler*, plaintiffs
21 sought to force the State to shoulder an immense expenditure to reverse naturally
22 occurring erosion and purposefully frustrate pedestrian access to public beaches in
23 contradiction of public policy. 85 Cal. App. 4th at 1014. By contrast, plaintiffs here
24 seek redress of harms caused by the City's affirmative conduct. The issues in
25 *Schooler* "dealt with a unique factual scenario" and the holding is "narrow." *Pierce v.*
26 *County of Orange*, No. SACV01981GLTMLGX, 2004 WL 7340113, at *2 (C.D. Cal.
27 June 4, 2004). In *Pierce*, the court denied defendant's motion to dismiss claims
28 seeking injunctive relief because plaintiffs sought to "enforce compliance with

1 mandatory state jail regulations and the California Disabled Persons Act... Plaintiffs
 2 are not seeking to expose the County to financial burdens it would not otherwise
 3 have incurred.” *Pierce v. County. of Orange*, No. SACV01981GLTMLGX, 2004 WL
 4 7340113, at *2 (C.D. Cal. June 4, 2004).

5 Plaintiffs here seek injunctive relief closer to that sought in *Pierce*. Plaintiffs
 6 allege affirmative acts that cause the above-described nuisance and violations of the
 7 Disabled Persons Act. (ECF No. 50 ¶¶ 13-14, 17-20, 22, 24-28, 45-55.)

8 The Court is free to enter “any injunction it deems appropriate” and take into
 9 account the defendant’s concerns. *Hood v. City of Sacramento*, no.
 10 223CV00232KJMCKD, 2023 WL 6541870, at *4 (E.D. Cal. Oct. 6, 2023). If and when
 11 the court considers remedies, the appropriate relief may be as simple as ordering the
 12 City to cease engaging in certain activities. The relief might result in a reduction in
 13 spending, eliminate practices that are in violation of state and federal law.

14 **F. Whether the City’s conduct falls under the Emergency Services**
 15 **Act or Proclamations is an issue of disputed fact.**

16 The City’s argument regarding the Emergency Services Act necessarily
 17 requires a resolution of disputed facts as to what “extent [plaintiffs’ claim] are based
 18 on actions or inactions related to the two emergencies.” (ECF no. 51 at p. 17.) The
 19 emergency proclamations do not provide specifics facts that relate to conduct alleged
 20 by plaintiffs that the Court may take judicial notice of to find an immunity applies.
 21 *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1000 (9th Cir. 2018) (trial court
 22 abused its discretion in dismissing Securities Exchange Act claims by relying upon
 23 judicial notice of an investors call transcript where there was reasonable dispute as
 24 to what specific facts were disclosed to investors.)

25 The City broadly claims that any conduct tangentially related to a
 26 proclamation issued by the City between February 25, 2020 through June 30, 2023 is
 27 immune. The City, however, does not identify any specific policy decision included in
 28 the documents of which it seeks judicial notice that relate to plaintiffs’ allegations.

1 The proclamations instead relate to exemptions from local rules regarding short term
2 leasing, hiring and government contracting requirements. (ECF no. 51-8 at p. 2, 51-9
3 at p. 2.) Lastly, plaintiffs allege conduct that is ongoing and outside the periods
4 covered by the proclamations. (ECF no. 50 ¶¶ 13-15, 17-20, 45-55.)

5 **V. CONCLUSION**

6 For the foregoing reasons, plaintiffs respectfully request that the Court deny
7 the City's motion to dismiss in its entirety.

8 WALKUP, MELODIA, KELLY & SCHOENBERGER

9 Dated: August 30, 2024

10
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PROOF OF SERVICE

**Jane Roe, et al. v. City and County of San Francisco, et al.
USDC-Northern California Case No. 4:24-cv-01562-JST**

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FIRST AMENDED COMPLAINT**

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a member of the bar of this Court at whose direction the service was made.

12 Executed on August 30, 2024, at San Francisco, California.
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